Supreme Court, U.S.
F I L E D
OCT 20 1999

No. 99-532

IN THE

Supreme Court of the United States

MARY JO SLICK, SHARON GRIFFITH, OSNABURG LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, BOARD MEMBERS DAVID A. HAUBERT, PHIL A. BUSHEY, FRANCIS AQUINO, BETSY KETCHUM, REED C. VARIAN and GEORGE McGUIRE, SUPERINTENDENT,

Petitioners,

v.

JOHN R. McINTOSH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO STATE SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

ALLEN SCHULMAN, JR.
ALLEN SCHULMAN & ASSOCIATES
740 United Bank Building
220 Market Avenue, South
Canton, Ohio 44702
(330) 456-4400

BRIAN L. ZIMMERMAN
Counsel of Record
740 United Bank Building
220 Market Avenue, South
Canton, Ohio 44702
(330) 454-8056

Attorneys for Respondent

155646

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
Reasons for Denying the Writ	5
I. Public Official	5
II. Public Figure	7
III. Federal Immunity	9
Conclusion	11

TABLE OF CITED AUTHORITES

Page

Cases:

Ayers v. International Broth of Elect. Workers, 66 F. 2d 441 (1982) 9

Gertz v. Robert Welch Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) 7, 8

Lorain Journal Co. v. Milkovich, 474 U.S. 953, 106 S. Ct. 322, 88 L. Ed. 2d 305 (1985) 6

New York Times Co. v. Sullivan, 376 U.S. 265, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) 5

Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966) 5

Statutes:

29 U.S.C. § 152 9

29 U.S.C. § 185 9

29 U.S.C. § 185(b) 9

Ohio Revised Code § 1745.02 10

Rule:

Supreme Court Rule 10 5

STATEMENT OF THE CASE

This case was initially determined in the trial court by summary judgment. As such, there remain numerous unresolved genuine issues of material fact. In presenting their case, Petitioners have provided this Court with only some facts and have misrepresented other "facts" that are not contained in the record. Thus, Respondent John R. McIntosh ("McIntosh") is compelled to present an accurate statement of the facts.

McIntosh was employed by the Osnaburg Local School District Board of Education ("School Board") as the East Canton High School Assistant Principal and, later, High School Principal, from 1987 through March of 1995. On February 27, 1995, the School Board met with McIntosh in executive session and presented him with the ultimatum that he either immediately resign as principal and accept a non-existent and non-approved county position, or his contract as principal would be non-renewed and he would be unemployed. The School Board also threatened to "blackball" McIntosh from any future employment should he refuse resignation. McIntosh refused to resign and reminded the School Board he was a tenured teacher entitled to re-employment within the School District.[1] Two days later, on March 1, 1995, McIntosh received notice that the School Board intended to consider non-renewal as his principal's contract at a meeting scheduled for March 13, 1995.

---

1. The trial court and reviewing courts have all concurred that McIntosh was a tenured teacher entitled to automatic re-employment within the School District. Based upon these state court rulings, McIntosh has recently been reinstated as a teacher.

As word of the potential non-renewal surfaced, students began wearing tiny ribbons that read "KEEP MAC", an unsolicited and innocuous show of support for their principal. One teacher, who was apparently pleased with the prospect of McIntosh's non-renewal, tore one of the ribbons off a student and reprimanded the student for wearing the ribbon. Distraught, the student contacted her mother, who in turn, contacted a local newspaper complaining that the school was violating her child's freedom of speech and expression. In response, a newspaper reporter and photographer came to the high school on March 9, 1995 and interviewed the student between classes and took a picture of some students who were wearing ribbons. McIntosh was not interviewed and made no statements to the media, neither did he seek to do so. Other than this isolated event, the undisputed evidence demonstrated that there were no student disruptions or changes in the academic environment in the high school while McIntosh served as principal.

Near the end of the school day, on the same day the student was interviewed, Superintendent McGuire, in the presence of two uniformed police officers, ordered McIntosh to vacate his school office and to remain on home assignment. The Superintendent also informed McIntosh that if he returned to the school, he would be considered a trespasser. Although the Superintendent attempted to justify this action by claiming McIntosh permitted "significant student support which disrupted the school day," the Superintendent subsequently admitted there were no disruptions and he had no evidence McIntosh was in any way involved with the students' show of support.

Not surprisingly, word of McIntosh's removal by the police spread quickly in this small community, resulting in

a "media frenzy", wherein the media from northeast Ohio literally surrounded the high school to gather information as to why uniformed Police officers were needed to remove a principal from a public high school. The next day, March 10, 1995, a significant number of students "boycotted or skipped school." Although the School Board and the Superintendent publically blamed McIntosh for this "student boycott", they all subsequently admitted in depositions they had absolutely no evidence that he had any involvement.

That same day, the Superintendent hand-delivered a notice (while a newspaper reporter was present) advising McIntosh he was going to recommend to the School Board that McIntosh's teaching/administrative contracts be suspended and/or terminated for *inter alia,* "**immorality,**" **"child endangerment, " "promoting student unrest,"** and **"causing a student boycott of classes."**

The School Board and the Superintendent have all admitted that they had no evidence to support any of these scurrilous charges.

Also on that same day, Petitioner Mary Jo Slick ("Slick"), a labor relations consultant employed by the Ohio Education Association ("OEA"), met with members of the East Canton Education Association ("ECEA"). At this meeting, Slick informed the ECEA members that it was important for the ECEA to issue a neutral statement supporting the statutory process of "non-renewing a principal's contract." Slick did not explain that the Superintendent also sought to terminate McIntosh's contracts of employment as principal and teacher.

At this meeting, ECEA members voted to issue a statement regarding McIntosh. However, the ECEA expressly limited the contents of this statement to a "neutral" statement supporting the statutory process of non-renewing the contract. The ECEA did not want to issue a statement with respect to the School Board's position regarding McIntosh's alleged misfeasance. Slick later explained:

> The position of the [ECEA] was not that the Board should or should not have non-renewed/terminated Mr. McIntosh. Rather the [ECEA] is supporting the Board of Education in that they "followed the process".

Although the ECEA admittedly voted to stay neutral, Slick and Petitioner Sharon Griffith, President of the ECEA, took it upon themselves to verbally attack McIntosh at his March 13, 1995 public hearing, attended by hundreds of people, including the media.[2] Not only did Slick and Griffith falsely state that the ECEA "overwhelmingly" supported the recommendation that McIntosh be fired, they also made false accusations that McIntosh "exploited students" and the teachers could never work with McIntosh again. Slick now claims these false statements were purportedly made on behalf of the ECEA.

It is from these facts that McIntosh filed his complaints of defamation and tortious interference against Petitioners. McIntosh will not restate the procedural history of this case. However, contrary to Petitioners claims, the record contains overwhelming evidence that Petitioners acted with actual malice in defaming McIntosh and interfering with his employment.

---

2. Contrary to Petitioners' claims, there is no evidence or truth that McIntosh "mustered hundreds of people to attend" the March 13, 1995 meeting.

The Ohio Supreme Court decision at issue was not the result of a "sharply divided" court. Instead, five of the seven justices from the Ohio Supreme Court concurred that McIntosh was neither a public official nor public figure for purposes of his defamation claims.[3]

REASONS FOR DENYING THE WRIT

Although some state courts of last resort have come to different conclusions of whether a high school principal is a public official, this case advances none of the other criteria identified in Supreme Court Rule 10, and for that reason, as well as the reasons that follow, this Court should deny jurisdiction on the Petition for Certiorari.

I.

PUBLIC OFFICIAL

The Ohio Supreme Court, in deciding the issue of whether McIntosh was a public official, recognized and applied the principles and guidelines set forth by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 265, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and *Rosenblatt v. Baer*, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966). The Court also recognized that other state courts "are divided whether public school principals should be accorded public official status." However, such a division is not surprising. As this Court has recognized, there is no hard and fast rule that applies to every high school principal throughout the country on this issue.

---

3. Six separate intermediate state appellate judges unanimously agreed that McIntosh was neither a public official nor public figure.

As acknowledged in Justice Brennan's dissent, joined by Justice Marshall, to this Court's denial of certiorari in *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 106 S. Ct. 322, 88 L. Ed. 2d 305, 308 (1985):

> First Amendment Protection can not turn on formalistic tests of how "high" up the ladder a particular government employee stands. Rather, we determined the focus must be on the nature of the public employee's function and the public's particular concern with his work.

This Court set forth the standards to be applied in determining what individuals, under the circumstances of the case, are public officials. The Ohio Supreme Court applied those standards to this particular case in determining McIntosh's status. Nonetheless, Petitioners would rather have this Court make a case by case determination of whether a principal, under all circumstances and in each state, should be considered a public official. It follows that Petitioners would then have this Court determine whether the assistant principal, the guidance counselor, the teacher, the substitute teacher, and the librarian should also be considered public officials. Not only would this Court be forced to consider the status of each person, it would also be placed in the position of having to review, *de novo*, cases from each of the fifty states to determine from the varying statutes establishing employment positions which state employees should be considered public officials. The analysis of this case, and the other individual cases, are better left to the state courts who apply this Court's guidelines.

II.

PUBLIC FIGURE

Contrary to Petitioners' claims, the Ohio Supreme Court properly applied this Court's law and guidelines in deciding that McIntosh was not a public figure. The determination of whether someone is a public figure is fact intensive and is done on a case by case basis. Here, the Ohio Supreme Court thoroughly reviewed the facts of this case and applied those facts to the guidelines enunciated by this Court. There is no reason why this Court should be placed in the position of having to re-evaluate the facts as already done by the Ohio Courts.

The Ohio Supreme Court specifically applied this Court's reasoning set forth in *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). Contrary to Petitioner's representations, there is absolutely no evidence in the record that McIntosh "actively sought public and media support to preserve his employment position." As the Ohio Supreme Court determined:

> As a high school principal, McIntosh did not assume a role of special prominence in the affairs of society. He did not occupy a position of such persuasive power and influence that he can be deemed a public figure for all purposes as required by *Gertz*. Nor did he thrust himself to the forefront of the public controversy that may have developed concerning his termination. According to the record before us, McIntosh left the high school on March 9, 1995, when ordered to do so by the Superintendent and armed police officers. There

> is no evidence linking McIntosh to the actions of the students and parents who protested his termination. Nor is there any evidence that McIntosh sought out the media to trumpet his cause. Accordingly, the trial court erred in finding that McIntosh was a public figure and requiring that he be held to the *New York Times* standard of proving actual malice.

Contrary to Petitioners representations, it was not the contract non-renewal and contract termination of McIntosh that "spawned widespread and emotional community interest" in this case. Instead, the interest occurred when the Superintendent decided to have two armed Police officers remove McIntosh from a public high school building during the school day coupled with the absolutely false allegations by Petitioners that McIntosh was "guilty of immorality", "child endangerment", and "exploiting students." As stated earlier, all Petitioners have admitted there was no evidence to support these outrageous charges. However, in view of what occurred, it is no surprise McIntosh was involuntarily pulled into the middle of this controversy by the actions of Petitioners.

In short, there is no truth that the Ohio Supreme Court failed to properly apply the standards set forth in this Court's decision in *Gertz, supra,* to the facts of this case.

III.

FEDERAL IMMUNITY

Lastly, Petitioners maintain that a federal issue exists in this case with respect to immunity of agents and representatives of a labor organization. Petitioners claim the Ohio Supreme Court should have granted immunity to Petitioners Slick and Griffith under 29 U.S.C. § 185(b). Yet, this case only presents an issue of state law, not an issue of federal labor immunity.

First, Petitioners have never addressed and do not now attempt to address the threshold issue of whether § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 applies to public employers. Petitioners Slick and Griffith now claim they are entitled to federal immunity because their statements were made on behalf of an association before "a public employer" in defense of the association's working conditions. However, §§ 301(a) and (b) of the Labor-Management Relations Act, 29 U.S.C. § 185, does not grant federal jurisdiction over claims involving employers of state political subdivisions.

29 U.S.C. § 152 provides in part:

> (2) the term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or wholly owned government corporation, or any federal reserve bank, *or any state or political subdivision thereof*. . . .[4]

---

4. *See also Ayers v. International Broth of Elect. Workers*, 66 F. 2d 441, 444 (1982).

Second, Petitioners did not request the Ohio Supreme Court to apply the federal statue in this case. Instead, Petitioners offered the federal statute as "supporting rationale" for its argument that they were entitled to immunity under a state statute, specifically, Ohio Revised Code § 1745.02. Petitioners can not now raise for the first time the issue of whether the federal statute has any application to this dispute involving a state political subdivision. Finally, the Ohio Supreme Court never addressed the issue regarding federal immunity. There is nothing in the Ohio Supreme Court decision or any of the intermediate appellate decisions that conflict with this Court's or other federal Courts' determinations regarding federal immunity under the Labor-Management Relations Act. The Ohio courts never addressed those issues because that federal issue was not before them.

CONCLUSION

For the reasons stated above, this case does not present any issue that would warrant this Court's review. As such, it is respectfully requested the petition should be denied.

Respectfully submitted,

BRIAN L. ZIMMERMAN
Counsel of Record
740 United Bank Building
220 Market Avenue, South
Canton, Ohio 44702
(330) 454-8056

ALLEN SCHULMAN, JR.
ALLEN SCHULMAN & ASSOCIATES
740 United Bank Building
220 Market Avenue, South
Canton, Ohio 44702
(330) 456-4400

Attorneys for Respondent